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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1932.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX.

	PAGE
Brief in Opposition to Petition for Writ of Certiorari	1-24
I.—The opinions of the Courts below (omitted from Petitioner's Brief)	1
II.—Inaccuracies and misleading statements in and omissions from the petition	2
III.—The National Bankruptcy Act confers broad powers in law and equity on the Courts of Bankruptcy. The making of tax bar orders is one of the powers frequently and necessarily exercised by those Courts. Under the Act a State's claim for taxes has a priority in advance of payment of dividends to creditors and the State must obey the reasonable orders of the Court	9
IV.—No questions of State sovereignty or of unconstitutional interference with any rights of the State are involved in this case	14
V.—The decision of the Circuit Court of Appeals has not finally precluded the State from filing a claim	16
VI.—The cases cited by the petitioner are not in point. There is no conflict among any of the Circuit Courts of Appeals as to the power of the Court to make tax bar orders	21
Conclusion	22

TABLE OF CASES CITED.

	PAGE
Anderson, *In re*, 279 Fed. 525	11, 12
Bates Machine & Tractor Co., *In re*, 8 Fed. (2d) 424	22
Employers Liability Assurance Corporation *v.* Astoria Mahogany Co., 6 Fed. (2d) 945	22
Marshall *v.* State of New York, 254 U. S. 380	8
Mitchell Store Building Co. *v.* Carroll, 193 Fed. 616, appeal dismissed and writ denied in 232 U. S. 379	11
Morgenstern & Co., Matter of, 57 Fed. (2d) 163	7, 13, 20
Stavin, *In re*, 12 Fed. (2d) 471	13
United States Fidelity Co. *v.* Bray, 225 U. S. 205	10
Wood & Henderson, *In re*, 210 U. S. 246	10

TABLE OF CONSTITUTIONS CITED.

United States Constitution, Article I, Section 8	16

TABLE OF STATUTES CITED.

National Bankruptcy Act:	
Section 2	9
Section 2, subd. 15	5
Section 38	11
Section 57	5, 21
Section 64	9, 15
Section 64-a	12

TABLE OF RULES CITED.

Rules of the Supreme Court of the United States, Rule 27, subdivision 2(b)	1

Supreme Court of the United States

OCTOBER TERM—1932.

THE PEOPLE OF THE STATE OF NEW YORK, Petitioners, AGAINST IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Respondent.	No. 304.

Brief in Opposition to Petition for Writ of Certiorari.

I.

The opinions of the Courts below (omitted from Petitioner's Brief).

The petitioner's brief fails to comply with the provisions of Rule 27, subdivision 2(b), of the Rules of this Court which require the petitioner's brief to contain a reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported. The information thus omitted by the petitioner will be furnished by the respondent:

The opinion of the Referee has not been reported. It appears in the printed record (R., 101).

The opinion of the United States District Court, Southern District of New York (Hon. Frank J. Cole-

man, District Judge) has not been reported. It appears in the printed record (R., 110).

The opinion of the United States Circuit Court of Appeals, Second Circuit, is reported in 58 Fed. (2d) 980, and is affixed to the printed record (R., following page 118).

II.

Inaccuracies and misleading statements in and omissions from the petition.

The following paragraphs of the petition occasion this criticism:

Paragraph "Second" states that franchise taxes for the tax years beginning November, 1927, and November, 1928, were "duly assessed on behalf of the petitioner, with respect to which there is no question presented to this Court." The record contains no evidence that such franchise taxes were "duly assessed." The record is concerned only with a certain "notice of an unliquidated claim for franchise taxes" against the bankrupt for the tax years beginning November 1, 1928, and additional franchise taxes for tax years beginning November 1, 1917, to 1918 inclusive.

Paragraph "Sixth" fails to disclose that Charles W. Hutchins is an employee of the State Tax Commission of the State of New York (R., 39).

Paragraph "Seventh" states that "on the date of filing of said claim, no distribution of the bankrupt's estate had been made", that "Final distribution has not been made to date" and that "The trustee has sufficient assets to pay the taxes due the State of New York, should a proper reaudit disclose liability therefor." The paper referred to as "said claim" is not a notice of claim but a "notice of an unliquidated claim for

additional franchise taxes," which notice contains a statement that "*claim will be filed* as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes." There is no basis in the record for the statement that the Trustee has sufficient assets to pay the taxes due the State of New York, should a proper reaudit disclose liability therefor. The amount of those unascertained and problematical taxes does not and, being undetermined, could not appear in the record. The petition fails to disclose that the assets in the hands of the Trustee are subject to the payment of attorneys' fees and other miscellaneous administration expenses which, under the rules of the Court, cannot be determined until the closing of the estate. In view of the large amount which the Trustee received for the assets of the bankrupt's estate, under the contract made with the purchaser corporation and approved by the orders of the Court (R., 75, 77) and the important services performed by the attorneys, these various administration expenses will be substantial in amount.

After asserting, without any foundation in the record, that the Trustee has sufficient assets to pay the State's claim, if any, for unascertained and undetermined taxes, the petitioner states in Paragraph "Eleventh" that "the petitioners are not in a position to file any actual claim for any additional tax liability until after proper reaudit by the referee in bankruptcy for additional tax liability owing to the Federal Government, based upon a determination of the correct income of the bankrupt for the tax years in question." Those tax years run from November 1, 1917, to 1928, inclusive, a period of eleven years. The record does not disclose whether or not there is any actual "additional tax liability owing to the Federal Government" and whether

or not any proceedings have been had for the purpose of determining such additional tax liability, if any.

Paragraph "Eighth" states that the Trustee did not move to expunge the "claim" until March 30, 1931. Here again the petitioner erroneously refers to the notice as a claim instead of a notice of an unliquidated claim and of an intention to file a claim. A claim for definitely ascertainable taxes is not an unliquidated claim. The time for the filing of any claim by the State, pursuant to the provisions of the tax bar order, expired on September 16, 1929. The motion to expunge the notice was returnable before the Referee on April 9, 1931. During the interval between September 16, 1929, and April 9, 1931, a period of nearly one year and seven months, no claim was filed by the State, pursuant to the intention to file the claim expressed in the "notice of unliquidated claim." The record is bare of any evidence of any attempt to file a claim. The petition itself, verified August 10, 1932, well over three years after the expiration of the tax bar order, alleges in Paragraph "Eleventh" that the petitioner is not in a position to file any actual claim even at the present time. The State is at sea and does not know whether or not it actually has a claim, although three years and six months have elapsed since the adjudication in bankruptcy.

Paragraph "Eighth" states that in the determination of the Referee no exception was taken to the claim as such. The petition mentions a claim when there was no claim to which any exception could be taken. Not only did the State file the notice in question after the expiration of the statutory six months' period for the filing of claims in bankruptcy and after the expiration of time allowed by the tax bar order, but the paper which the State filed was not in conformity with the

requirements of Section 57 of the Bankruptcy Act which pertains to the form and contents of a proof of claim.

Paragraph "Tenth" states that the United States Circuit Court of Appeals for the Second Circuit affirmed the order of the District Court expunging the "claim" by decision rendered May 23, 1932. The petition fails to advise this Court that the affirmance by the Circuit Court of Appeals was made "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (Opinion of Circuit Court of Appeals affixed to record).

Paragraph "Twelfth" states that the tax bar order was not made "pursuant to any statutory authority". This is not a fact, for the National Bankruptcy Act, Section 2, subdivision 15, provides that the Courts of Bankruptcy are invested with power to "make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of this Act" and the various Circuit Courts of Appeals have uniformly held that tax bar orders are proper and necessary to effect an orderly and expeditious administration of estates in bankruptcy.

Paragraph "Twelfth" states that this Court has never passed on the power and authority of a Referee in bankruptcy to make a tax bar order or to preclude a sovereign State from filing a tax claim after the expiration of the time limited in the tax bar order, even though the Trustee holds "undistributed assets more than sufficient to pay the asserted tax claim, if and when established". The power of the District Court, acting through its Referees, to make tax bar orders has been uniformly recognized by the Circuit Court of

Appeals. It has apparently been the practice of this Court not to clutter its calendars with cases relating to orders made by the Referees, the District Courts and the Circuit Courts of Appeals in bankruptcy cases. Paragraph "Twelfth" again asserts without warrant in the record that the Trustee has on hand funds more than sufficient to pay the amount of an unascertained and undetermined tax claim, if any, for possible additional taxes for a period of eleven years.

Paragraph "Thirteenth" again without foundation in the evidence makes an assertion with regard to "sufficient assets remaining undistributed to pay such tax liability when established".

Paragraph "Thirteenth" states that "the questions involved will recur for determination in innumerable future bankruptcies". That assertion implies that the State of New York will be dilatory and negligent hereafter in filing claims, if any, in compliance with the Bankruptcy Act and the orders of the Court. The assertion is in the field of prophecy and is not based upon any evidence in the record. The National Bankruptcy Act has been in operation since 1898, a period of thirty-four years, during all of which time the State of New York has been levying taxes and doubtless filing timely claims in proper form against estates in bankruptcy. Apparently, during all of these years the State has never had occasion to raise the question raised in the present case. It is hardly probable that the State, if diligent and careful in the preparation and filing of its claims, will be involved hereafter in a situation similar to that which exists in the present case. No question of "paramount public importance to the tax system of the State of New York" and of other States, as the petitioner urges, is involved in this case. It is a simple matter for a State to comply with the provisions of a tax bar order or, if unable to do so within the

sixty days allowed by the order, to apply to the bankruptcy court before the expiration of the order for an extension of time within which to obtain any necessary information and to file a claim against a bankrupt estate. (*Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163, (C. C. A. 2nd).)

Question No. 2 in paragraph "Fourteenth" refers to a "claim" instead of a "notice of unliquidated claim" containing a statement of intention to file a claim thereafter, and states that the "claim" "was permitted to remain on file with the Referee for a period of one year and five months from the date of filing before any motion was made to expunge the same because not filed in time". The Court's attention must again be called to the fact that during that period of one year and five months there was on file only the empty and meaningless notice of an unliquidated claim expressing an intention thereafter to file a claim. The Trustee did not permit any actual claim to remain on file with the Referee for the period of one year and five months before moving to expunge such claim because it was not filed within the time provided by the tax bar order. The State made no attempt to file a claim during that long interval and the Trustee's motion to expunge was merely a motion for an order declaring a default which had long since occurred. The State and not the Trustee was guilty of gross laches. Furthermore, Question No. 2 contains the unfounded statement that the Trustee holds "sufficient undistributed assets of said bankrupt to pay the said claim in full, upon the same being established as to amount by the Referee in Bankruptcy". Manifestly, the State, not knowing whether or not it has a claim and not knowing the amount of such claim, if any, is unable to state whether or not the assets in the hands of the Trustee will be sufficient to pay such claim if and when established, the funds in

the hands of the Trustee being subject first to the payment of attorneys' fees and all other administration expenses. There is no evidence in the record of the amount, if any, still in the hands of the Trustee.

Question No. 3 in paragraph "Fourteenth" contains statements similar to those made in Question No. 2 and equally misleading and unfounded.

Paragraph "Third" states that under decisions of the Court of Appeals of the State of New York "such possible increased tax liability * * * is a lien on the property of the corporation as of the date when the tax should have been paid, although subject to subsequent ascertainment as to amount". On page 21 of its brief the State contends that the bar order bars taxes "that have not actually accrued or been levied and surely it is not within the province of a bar order to bar future taxes that may or may not accrue". The State here takes an inconsistent position. The Court of Appeals of the State of New York held that within the State taxes were due though unascertained. The bar order does not bar taxes "that have not actually accrued or been levied". It bars only claims of the State which accrued prior to the adjudication in bankruptcy at or prior to which time the corporation ceased to function as a going concern liable to the payment of franchise taxes.

Paragraph "Fifteenth" states that the questions set forth in paragraph "Fourteenth" should be answered in the negative in order that the sovereignty of the State, as interpreted in *Marshall* v. *State of New York*, 254 U. S. 380, may be maintained and preserved. That case was not a bankruptcy case and had no relation to tax bar orders. It involved an equity receivership and the State's right to priority of payment to its claims over the claims of general creditors.

III.

The National Bankruptcy Act confers broad powers in law and equity on the Courts of Bankruptcy. The making of tax bar orders is one of the powers frequently and necessarily exercised by those Courts. Under the Act a State's claim for taxes has a priority in advance of payment of dividends to creditors and the State must obey the reasonable orders of the Court.

Section 2 of the Bankruptcy Act invests courts of bankruptcy with the power to:

> "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates";
>
> "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy";
>
> "(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided";
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act";
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Under Section 64 of the National Bankruptcy Act, taxes legally due and owing by a bankrupt "to the United States, state, county, district, or municipality"

are granted certain priorities. This is a special benefit which the Bankruptcy Act confers upon a State, and to obtain that benefit, the State must comply with the orders of the bankruptcy court made pursuant to the general powers conferred upon it by the Act, and among these orders are tax bar orders.

In *In re Wood & Henderson*, 210 U. S. 246, this Court said at page 254:

> "Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

In *United States Fidelity Co.* v. *Bray*, 225 U. S. 205, this Court said at page 217:

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them * * * A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

In *Mitchell Store Building Co. v. Carroll*, 193 Fed. 616, appeal dismissed and writ denied in 232 U. S. 379, the Court said:

> "This provision (Section 2 of the Bankruptcy Act) must be given a free interpretation as conveying 'broad powers' upon the bankruptcy court 'to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy'."

Under the Bankruptcy Act the Referees are invested with, among other powers, the jurisdiction to perform such acts and duties as is conferred on courts of bankruptcy except as to questions arising out of the applications of bankrupts for composition or discharges and except as may otherwise be provided in the Act. (*National Bankruptcy Act, Section* 38.) The Referees have original jurisdiction to issue tax bar orders, and all reported cases relating to such orders are based upon appeals from orders made by the Referees.

The practice of making tax bar orders is sound and well established by the various Circuit Courts of Appeals. Tax bar orders are issued in the interest of all of the creditors of a bankrupt for the purpose of bringing before the Court claims of any sovereign taxing powers so that such claims may be speedily adjudicated and the bankrupt estate liquidated with all possible expedition.

In *In re Anderson*, 279 Fed. 525 (Circuit Court of Appeals, Second Circuit), a Trustee in bankruptcy served a notice of motion for an order directing the United States to file a claim or be barred. The United States appeared specially and moved for a denial of the motion on the ground that the Court was without juris-

diction to make such an order. The Trustee's motion was granted and on appeal the Referee's bar order was affirmed, the Court saying at page 529:

> "The United States must file its claim for taxes as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of Section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546."

Section 64-a of the Bankruptcy Act relates not only to claims for taxes due to the United States, but also to claims for taxes due to any state, county, district or municipality, and what was said in the *Anderson* case, just cited, applies with equal force to the present case involving, as it does, a possible claim for taxes alleged to be due to a State.

In *In re Stavin*, 12 Fed. (2d) 471, Judge Thacher, now Solicitor General, said with reference to tax bar orders at page 473:

> "But under Section 64-a, taxes legally due and owing by the bankrupt must first be determined and ordered paid. For this purpose the bankruptcy court may by proper notice bring the state and the United States before it to the end that claims for all taxes legally due and owing may be ascertained and their validity determined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper and clearly within the jurisdiction of the court in the exercise of its power under Section 64a."

In *Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163 (Circuit Court of Appeals, Second Circuit), the Court affirmed an order of the District Court confirming an order of a Referee expunging a claim filed by the Collector of Internal Revenue, and the Court said:

> "But, under our construction of Section 64-a of the Bankruptcy Act the bankruptcy court, in aid of speedy administration, might limit the time within which the Government might prove its claim against the estate. If the Commissioner, because of existing exigencies, required more time to make his assessment, application should have been made to the court to modify its order so as to extend the time to file proof of claim. In default of such an extension the order barring claims would protect the trustee in distributions of assets made while it stood. Any other interpretation of its effect would enable the Government to take its time in presenting claims for taxes and would thus destroy the very advantages which orders limiting the time to file tax claims have been designed to prevent."

Surely it could not be seriously contended that under the Bankruptcy Act a State has rights greater than those of the Federal Government. Neither the Federal Government nor any State Government may disregard bar orders with impunity.

IV.

No questions of State sovereignty or of unconstitutional interference with any rights of the State are involved in this case.

There is no dispute by the State in the present case that it failed to comply with the provisions of the tax bar order. It attempts to justify its disobedience of the tax bar order by asserting in the title of Point I of its brief that "The judicial requirement to the State to file a claim for taxes within a specified period or be thereafter barred from filing such claim is an unconstitutional infringement of State sovereignty". Such a contention is manifestly untenable. The State evidently realizes this for there is no reference in its argument to any article or section of the Federal Constitution alleged to have been infringed by the tax bar order. If any right of the State under the Federal Constitution has been infringed by any portion of the Bankruptcy Act or by any order of the bankruptcy court, the specific provision of the Constitution conferring or reserving such right of the State should be indicated in the State's brief.

There is, furthermore, no argument in support of the assertion that the sovereignty of the State has been infringed. The State cites many cases in its brief which did not arise in any Federal Court or in any bankruptcy case and which have no bearing upon or rela-

tion to the question involved in the present case. It is not necessary to recatalogue those cases in this brief with any accompanying arguments distinguishing them from this case. Those cases related to the jurisdiction of the State on the subject of taxation for State purposes and held that the jurisdiction of the State in that respect is supreme. But that jurisdiction lies within the confines of the State itself and is in no way affected by any provision of the Bankruptcy Act or by the tax bar order in question which merely called upon the State to file its claim, if any, in the bankruptcy court within a prescribed time if the State desired to avail itself of the special benefits of priority conferred upon it as a tax creditor by Section 64 of the Bankruptcy Act.

The Trustee does not question the right of the State to levy and collect taxes under its laws and its right to a priority as a creditor in bankruptcy when its claim is properly filed. A State is a sovereign within its own walls. To some extent its powers are controlled by the Federal Constitution and by statutes adopted pursuant to the powers reserved to the Federal Government by the Constitution. The National Bankruptcy Act was enacted pursuant to special Constitutional sanction, and sovereigns and citizens alike, who, as creditors, desire to participate in the distribution of a bankrupt estate, must comply with the Federal statutes and the orders of the Federal courts relating to the administration of a bankrupt estate.

In the present case the State admits (State's brief, page 16) that distribution of a bankrupt's estate would be rendered impossible unless a limitation should be prescribed for the filing of a claim by the State for taxes, at the end of which time the Court could imply a waiver in connection with the distribution of the estate. The State admits (State's brief, page 16) that "The practice of issuing bar orders was only intended

to accomplish this result." The State thus admits that the issuance of a tax bar order in bankruptcy is both necessary and proper.

Tax bar orders, under the Bankruptcy Act, do not in any way involve questions of State sovereignty. If the State cannot be barred by the bankruptcy court from filing a claim unless filed within a specified reasonable period, then the State may ignore the entire Bankruptcy Act and may sue a bankrupt upon a claim for franchise taxes in a State Court and levy upon the bankrupt's personal property in the hands of the Trustee in complete and total disregard of the rights of other creditors, including the Federal Government itself, under the Bankruptcy Act. The Bankruptcy Act was enacted pursuant to the power conferred upon Congress by Article I, Section 8, of the Federal Constitution and is binding upon all citizens and sovereigns, including the Federal Government itself, as are all orders of the court made pursuant to powers conferred by the Act.

V.

The decision of the Circuit Court of Appeals has not finally precluded the State from filing a claim.

All possible rights of the State have been safeguarded by the decision of the Circuit Court of Appeals which, in spite of the State's default under the tax bar order, nevertheless gives to the State the right to make "an application presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (Opinion of Circuit Court of Appeals).

When the State filed the notice in question on October 20, 1929, the State was already in default under the terms of the tax bar order. The Trustee's motion to expunge the notice was unnecessary for the State had already been barred. The Trustee's motion was made, however, for the purpose of having an order made of record declaring and establishing the default. Such a motion could be made by the Trustee at any time after the default had occurred. The order of the Referee is virtually a judgment by default and instead of appealing from that order, as the State has done, the State should have moved to open its default upon proper papers and upon good grounds, if any it had. Although the State has thus far failed to move to open its default, the Circuit Court of Appeals has nevertheless opened the door for the State to present an application for leave to file its actual claim, if any, at the present time.

The State admits that no actual claim has been filed. The notice which the State filed (R., 19; petition 4) is not a proof of claim, either liquidated or unliquidated. It is a mere notice of an intention to file a claim if and when the State shall have information upon which a tax, if any, can be computed. The State must present an actual claim for a specific sum of money and must show that undistributed assets in the hands of the Trustee are sufficient not only to pay all administration expenses and claims duly filed and undetermined, but also to pay the claim of the State, in full or in part, without prejudice to other creditors, the amounts of whose claims in this case were to be paid in full to the Trustee by the purchaser of the assets. Thus far the State has not complied with any of these essential requirements.

On page 17 of its brief the State asserts that "There has been no prejudice to anybody." But proof to sup-

port that statement is wholly lacking in the record. On the same page the State italicizes the following statement: "The estate is in the same condition as it would have been had the State filed its claim within the limitation of time prescribed by the bar order," but the State fails to refer this Court and the respondent to any evidence in the record to support that emphasized assertion. The record contains merely an informal statement by the Referee, made at the hearing on June 24, 1931, to the effect that the then balance in the hands of the Trustee was $50,539.06 (R., 38, 47). But we have no proof in the record, however, other than that informal statement to show what the undistributed assets at that time amounted to. Substantial assets have already been distributed to creditors by way of dividends, a fact manifested by the contract made with the purchaser of the bankrupt's assets and by the Referee's schedule of September 20, 1929 (R., 75-79, 87, 89-99).

There are many facts relating to the assets of the bankrupt which are not in the record for they do not bear upon the questions raised upon the appeal to the Circuit Court of Appeals. They would, however, have an important bearing upon any motion to open the State's default under the tax bar order addressed to the discretion of the Court. The moneys still in the possession of the Trustee are subject to the payment of the Trustee's commissions, the fees of the attorneys, the Referee's fees, and other administration expenses, and subject also to the possible payment of certain other claims which have been disputed and which are being litigated.

This is a unique bankruptcy. The assets of the bankrupt were sold to a purchaser which, pursuant to its contract with the Trustee, approved by the Court, paid to the Trustee the full amount of all claims filed

with and allowed by the Referee on or before September 19, 1929, which date was thirteen days after the expiration of the statutory six months' period for the filing of claims (R., 91). The tax bar order served upon the State of New York expired September 16, 1929, and if the State had filed its claim in compliance with the provisions of the tax bar order, the amount of that claim, if allowed by the Referee, would have been paid in full to the Trustee by the purchaser of the assets. If objected to, payment of the claim would have been secured by the purchaser of the assets (R., 91, 92). No creditor would then have been prejudiced by the payment of any claim of the State (R., 75-79, 87, 89-99). Pursuant to the agreement made with the purchaser of the assets, the Referee on September 20, 1929, prepared and signed a schedule of claims filed with him enumerating the claims allowed without objection, the claims allowed and against which objections or petitions for reconsideration had been filed, and the claims allowed and later amended or reduced by order of the Referee (R., 99, 100). The State of New York, having failed to file a claim for any additional franchise tax liability for the tax years "beginning November 1, 1927, to 1928 inclusive," its claim, whether allowed or objected to, could not be and was not included in the schedule prepared by the Referee, pursuant to the contract made by the purchaser.

In the present case the Trustee, relying on the bar order and the failure of the State to comply with its terms, disbursed by way of dividends $328,000, as indicated by said contract made with the purchaser and by the Referee's schedule. Had the State filed in time an actual claim for a definite amount, the Trustee would have obtained from the purchaser of the assets cash or security to cover the claim of the State, if and when allowed.

In *In re Morgenstern & Co.*, 57 Fed. (2nd) 163 (Circuit Court of Appeals, Second Circuit) the Court said on page 164:

> "The Government contends that the order barring it from filing claims for taxes after October 11, 1930, and from sharing in the assets of the estate except as to claims so filed does not affect assets still undistributed. But we know nothing about the extent or even the existence of such undistributed assets. It may be that assets have already been distributed to creditors by way of dividends which ought to have been retained for other purposes if the estate was to be subject to the deduction of the income taxes in question. While counsel say that there are still undistributed assets, we ought not to go on mere general statements which are not of record, and, without definite facts, ought not to treat the proof of claim as an application for a modification of the so-called 'bar order'."

In the *Morgenstern* case just cited the Government filed an actual claim for a definite amount. In the present case no actual claim has been filed and even if the record contained definite proof of the amount of the undistributed assets in the hands of the Trustee, the Court would be unable to determine whether or not those assets, after the payment of administration expenses, would be sufficient to pay the claim of the State which is now nebulous, uncomputed and undetermined.

VI.

The cases cited by the petitioner are not in point. There is no conflict among any of the Circuit Courts of Appeals as to the power of the Court to make tax bar orders.

In none of the cases cited by the State were the facts similar to those in the present case. In all of those cases the tax claims were actual claims for definite amounts. In the present case no actual claim was filed. There was filed merely a paper embodying a notice of an intention to file a claim and not a proof of claim complying with the requirements of Section 57 of the Bankruptcy Act. In none of the cases cited by the State were funds supplied, as they were in the present case, by a purchaser of the assets of the bankrupt sufficient to pay in full all claims duly filed and allowed within a specified time together with security to cover the payment in full of all claims duly filed within such time and objected to.

No provision has been made for the payment of claims of general creditors filed or sought to be filed after the expiration of the statutory six months' period for the filing of claims of such creditors or for the payment of any claims of the Federal or State Governments filed after the expiration of tax bar orders. To permit tax claims to be filed after the expiration of tax bar orders in this matter and then to be allowed would deprive the general creditors of the dividends guaranteed to them by the contract made with the purchaser of the assets, which contract had the approval of the creditors and of the Court. The State was vigilant in filing its original claim for One Thousand Three Hundred Seventy-two and 37/100 Dollars (R., 23), and if it had been equally vigilant in the filing of any claim for additional taxes within the time re-

quired by the bar order, the purchaser of the assets would have supplied such additional cash or security as would have been necessary to insure payment of the State's additional claim, if and when allowed.

There is no conflict of opinion between any of the Circuit Courts of Appeal as to the propriety under the law of issuing tax bar orders against the Federal Government and against any State Government. In some cases, including some of those cited by the State, the Circuit Court of Appeals has held that a tax bar order will be lifted if the United States or a State, as the case may be, should file an actual claim and if funds remained in the hands of a Trustee sufficient to pay such claim without prejudice to other creditors.

On page 21 of its brief the State citing the case of *In re Bates Machine & Tractor Co.*, 8 Fed. (2d) 424 (District Court, N. D. Illinois, E. D.), asserts that in that case "the facts are somewhat similar to the present case under review". The two cases are essentially dissimilar. In the *Bates* case an actual claim for $24,559.92 additional income tax was filed after the tax bar order had expired. In the present case no actual claim was ever filed after the tax bar order had been made and served. There are other points of dissimilarity between the two cases which need not be detailed.

On page 19 of its brief the State cites the case of *Employers Liability Assurance Corporation* v. *Astoria Mahogany Co.*, 6 Fed. (2d) 945, and asserts that that case was a decision "by this Court". That case was not decided by this Court but by the Circuit Court of Appeals, Second Circuit.

Conclusion.

The adjudication in bankruptcy in this matter took place on March 6, 1929. The time for general creditors to file claims expired September 6, 1929. The tax bar

order in question was served on the State on July 18, 1929, and required the State to file its proof of claim, if any, within sixty days, which expired September 16, 1929. The State's notice of intention to file a claim was filed on October 20, 1929. The motion to expunge the notice was returnable before the Referee on April 9, 1931, and during the long interval of one year and seven months between the date of the filing of the notice and the date of the motion the State did nothing with respect to its alleged claim. Nor has the State done anything with relation to its claim, if any, since the granting of the motion by the Referee other than to appeal from his order. It is now over three years and six months since the adjudication of the bankrupt and the estate is still open. Judge Coleman of the District Court, in his opinion affirming the Referee's order, said:

> "The notice of claim was filed more than a month after the expiration of the tax bar period and for that reason must be expunged. The State had made no application to open its default and for leave to file a claim after the time provided by the bar order. It is impossible to determine upon the papers before me whether such application should be granted when it is made. Certainly the State has been extremely dilatory and remiss in regard to this matter. That may not in itself be sufficient to deprive it of the right to share in the undistributed assets because it does not sufficiently appear how such conduct may have prejudiced others. 85% of the assets have already been disbursed, but there still remains approximately $50,000. To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by

> the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come" (R., 110).

The petition on the State's present application was verified August 10, 1932, and contains no allegation that even at this late time, three years after the expiration of the bar order, the State is ready and able to file an actual claim. The State now seeks further to delay indefinitely the time for the closing of the estate of the bankruptcy by the Trustee and by the bankruptcy court by keeping open unconditionally its time for the future filing of an unknown, unascertained, and perhaps non-existent and unprovable claim.

The application for the writ of certiorari should be denied with costs.

Dated, New York, September 8, 1932.

Respectfully submitted,

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S. John Block,
Of Counsel.

Robert Halpern,
With him on the brief.